



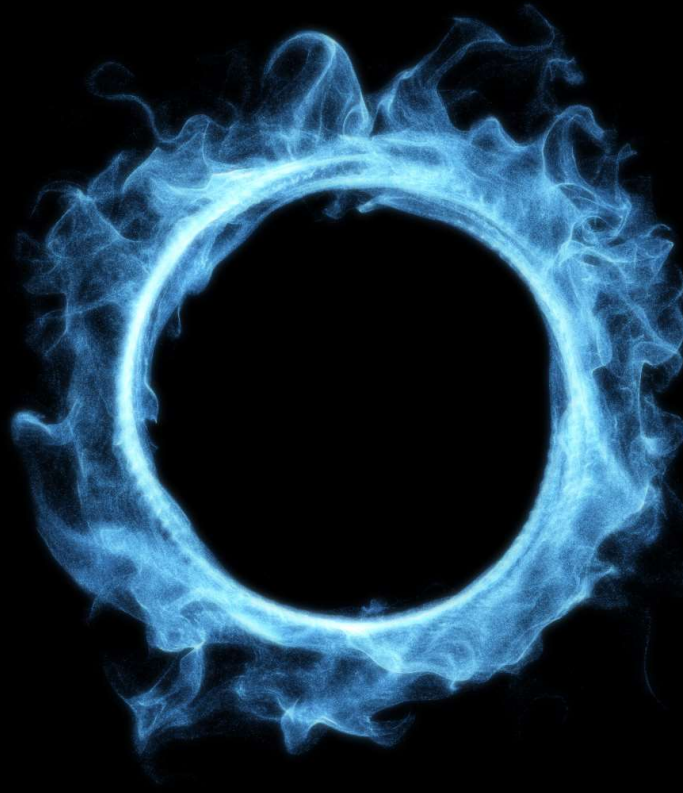
THOMAS HUG

**TRANSFER PRICING  
DEVELOPMENTS &  
EXPLORING HOW PILLAR II  
AND TRANSFER PRICING  
INTERACT**

**DELOITTE, 23 & 28 NOVEMBER**

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## Transfer Pricing Developments and Exploring How Pillar II and Transfer Pricing Interact

Zurich, 23 November 2023

Geneva, 28 November 2023

## Speakers



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## Agenda

14:00 - 14:20	Registration and Welcome
14:20 - 14:50	Part 1 - Global Transfer Pricing Policy Developments (Technical Update & Group Discussion)
14:50 - 15:10	Coffee break
15:10 - 17:00	Part 2 - Importance of Obtaining Transfer Pricing Certainty in Light of the Pillar 2 Rules (Technical Update & Group Discussion)
17:00 - 17:15	Q&A & Wrap-up
17:15 - 18:30	Networking Aperó

# Global Transfer Pricing Policy Developments

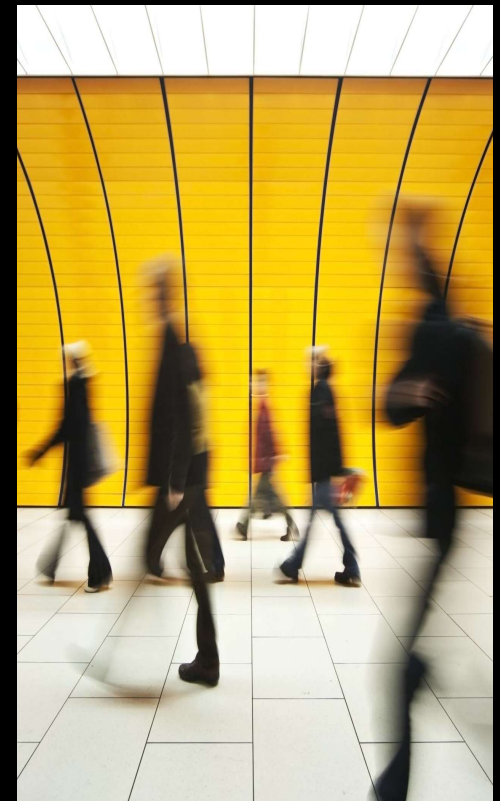
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# Global Transfer Pricing Developments (1)

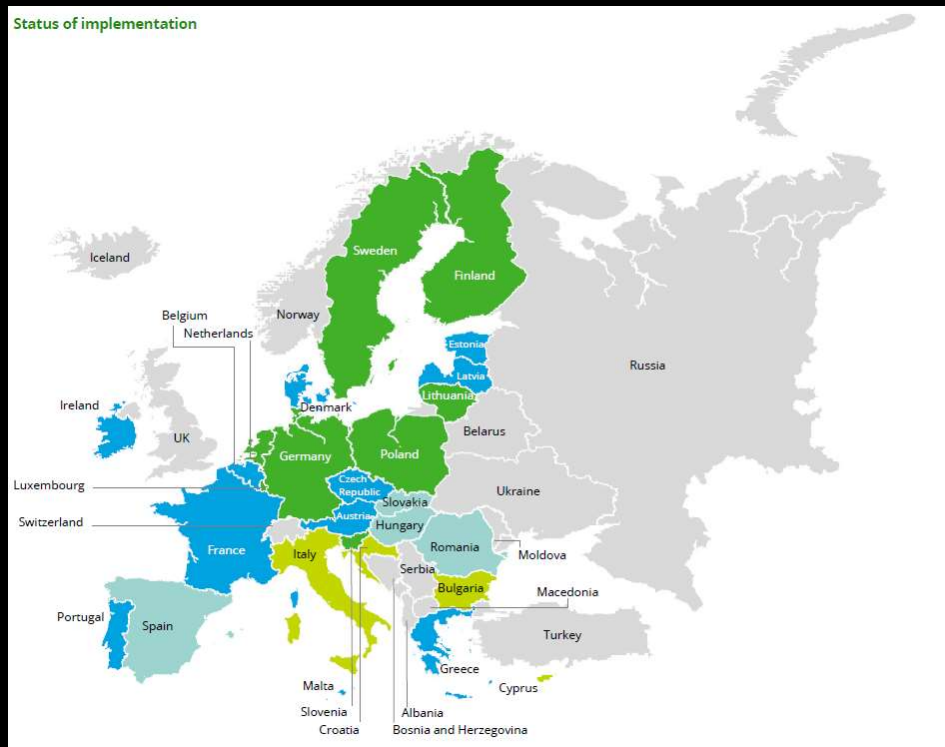
## EU Public CbCR (1) – Technical Update

- **Who:** EU/non-EU Multinationals with revenue exceeding EUR 750 million threshold for each of the last two financial years which are present through at least one medium/large-sized entity in the EU;
- **What:** Multinationals in scope are required to make their CbCR publicly available. The content of this EU Public CbCR is mostly consistent with the existing CbCR. The data sets must be disclosed country-by-country for each Member State and on an aggregated basis for all other states (except for jurisdictions included on the EU list of non-cooperative jurisdiction or on the 'grey list' for two consecutive financial years which must also be published on a country-by-country basis;
- **How:** The report should be made accessible on the public registry of the relevant Member State and on the company website free of charge for a minimum of five consecutive years;
- **When:** The first reporting obligation is for the financial year ending 31 December 2025, no later than 12 months after the end of the period, i.e., by 31 December 2026;
- **What Else:** Romania has adopted the EU Directive earlier with effect that the first reporting obligation is already for the financial years starting after 1 January 2023. Spain has a shorter reporting deadline (6 instead of 12 months).



## Global Transfer Pricing Developments (2)

### EU Public CbCR (2) – Status of Implementation



#### Legend:

- 4 Legislative process has not yet started
- 11 Public CbCR rules are in the process of national consultation
- 8 Draft legislation has been published
- 4 Legislation implementing Public CbCR has already been passed

## Global Transfer Pricing Developments (3)

### EU Public CbCR (3) – Discussion Points

- Communication strategy when disclosing CbCR;
- Interaction of “traditional” CbCR with EU Public CbCR and Pillar 2 Qualified CbCR;
- Source of data to prepare CbCR (internal figures, international accounting standards etc.);
- Role of “safe guard”-clause;
- CbCR as a deed (German: “Urkunde” / French: “titre”);

#### **Art. 32**      Ergänzungssteuerbetrug

<sup>1</sup> Wer zum Zweck der Hinterziehung einer Ergänzungssteuer im Sinne von Artikel 29 gefälschte, verfälschte oder inhaltlich unwahre Urkunden wie Geschäftsbücher, Bilanzen, Erfolgsrechnungen oder Lohnausweise und andere Bescheinigungen Dritter zur Täuschung gebraucht, wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft. Eine bedingte Strafe kann mit Busse bis zu 10 000 Franken verbunden werden.

#### **Art. 32**      Usage de faux

<sup>1</sup> Celui qui, dans le but de commettre une soustraction de l'impôt complémentaire au sens de l'art. 29, fait usage de titres faux, falsifiés ou inexacts quant à leur contenu, tels que des livres comptables, des bilans, des comptes de résultat ou des certificats de salaire et autres attestations de tiers dans le dessein de tromper l'autorité fiscale, est puni d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire. Une peine avec sursis peut être assortie d'une amende de 10 000 francs au plus.

- How to get comfortable with the content of the CbCR;
- Future of CbCR



## Global Transfer Pricing Developments (4)

### Transfer Pricing Directive (1) – Technical Update

- **Who:** All taxpayers that are registered or subject to tax in one Member State.
- **What:** The Directive ensures that the arm's length principle and its interpretation in the OECD Transfer Pricing Guidelines (version 2022) become part of the legislation of all Member States. Beyond this codification, the Directive aims to achieve more consistent application and interpretation of these rules within the EU, by providing:
  - **Definition:** Common definition of associated enterprises (and therefore the transaction covered);
  - **Corresponding Adjustments:** A process for applying corresponding adjustments on cross-border transactions within the EU that aims at resolving, within 180 days, any double taxation that follows from TP adjustments made by an EU Member State;
  - **Year-end Adjustments:** A framework through which year-end adjustments on associated transactions within the EU are recognized both by the Member State where the upward adjustment is made and the Member State where the downward adjustment is made;
  - **Range of Values:** When the application of a TP methodology produces a range of values, the interquartile range must be used as reference.
- **When:** The draft TP Directive will now move to the negotiation phase among Member States, with the aim of reaching unanimous agreement. The Commission proposes that the Member States transpose the TP Directive by 31 December 2025 and apply these provisions from 1 January 2026.



## Global Transfer Pricing Developments (5)

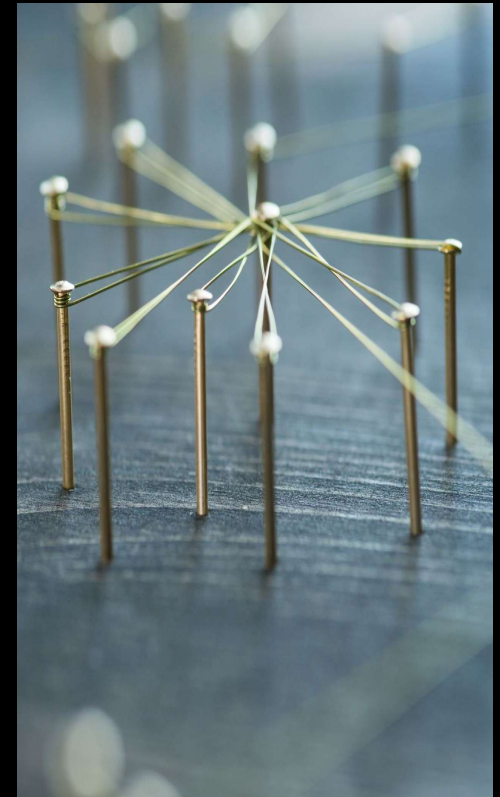
### Transfer Pricing Directive (2) – Discussion Points

- Pro's of new directive: increase of tax certainty for taxpayers (OECD TP Guidelines as applicable standard for interpreting arm's length principle, corresponding adjustments, year-end adjustments);
- Con's of new directive: deviation from OECD TP Guidelines (setting of price within a range: interquartile range vs. central tendency, transactions in scope, selected PEs covered by Transfer Pricing Directive, definition of "year-end adjustments");
- Impact on future bilateral transfer pricing cases between Switzerland (OECD TP Guidelines) and EU Member State (Transfer Pricing Directive)

# Global Transfer Pricing Developments (6)

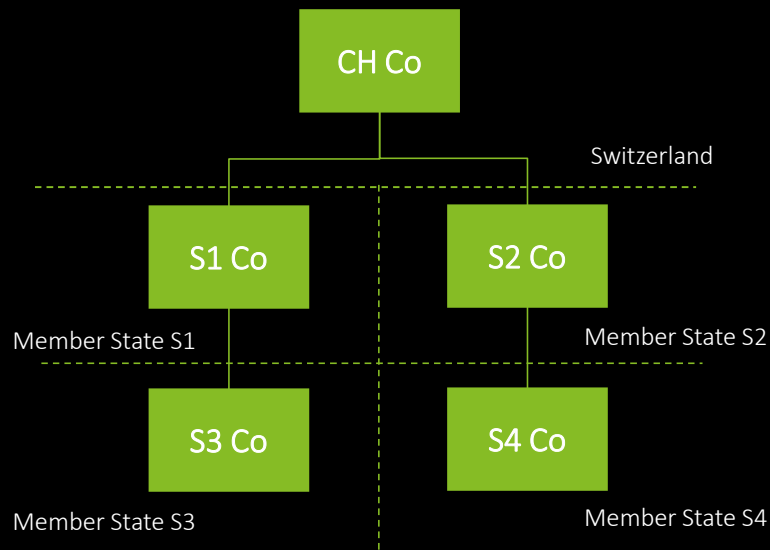
## BEFIT Directive (1) – Technical Update

- **Who:** Groups within the scope of the OECD Pillar Two initiative (annual combined revenues of at least EUR 750 million in two or more of the last four years), limited to the subset of entities in the EU that meet a 75% ownership threshold (“BEFIT group”). If the ultimate parent of the group is outside the EU, BEFIT would only apply if the revenues of the BEFIT group within the EU exceed 5% of the total group revenues or account for at least EUR 50 million in combined revenue in two or more of the last four years;
- **What:** The BEFIT rules follow a three-step-approach:
  - **Determination:** All BEFIT group members determine their tax basis according to common rules based on the accounting standard used by the ultimate parent company to prepare the consolidated financial statements (e.g., IFRS, US GAAP), with various corrections;
  - **Aggregation:** The preliminary tax results of all BEFIT group members are combined at the level of the filing entity (e.g., ultimate parent entity), with the effect of a cross-border profit/loss off-setting (“BEFIT tax base”);
  - **Allocation:** The BEFIT tax base will be allocated between the BEFIT group members in accordance with a “baseline allocation percentage.” This percentage would be determined by the following formula:  $(\text{taxable result of BEFIT group member} / \text{total taxable result of BEFIT group}) \times 100$ . In determining the taxable results, the average of the taxable results in the three previous fiscal years would be considered (potentially other allocation key after 2031);
- **When:** The proposed BEFIT Directive was published on 12 September 2023 and will now be sent to the European Parliament and the European Council. The rules should come into force on 1 July 2028.



## Global Transfer Pricing Developments (7)

### BEFIT Directive (2) – Example



- CH Co is a resident in Switzerland and it is a UPE of BEFIT Group;
- It wholly owns S1 Co, S2 Co, S3 Co and S4 Co resident in State S1, S2, S3 and S4, respectively. All these states are EU Member States;
- In the Year 2030, the 3-year average (2029, 2028, 2027) taxable results of:
  - S1 Co is 100 of profit;
  - S2 Co is 10 of profit;
  - S3 Co is 50 of profit;
  - S4 Co is 90 of profit
- In the Year 2030, the preliminary tax result of:
  - S1 Co is 120 of profit;
  - S2 Co is 20 loss;
  - S3 Co is 50 of profit;
  - S4 Co is 100 profit

## Global Transfer Pricing Developments (8)

### BEFIT Directive (3) – Example

	BEFIT Group Member	Average Taxable Results	Preliminary Tax Result
S1 Co	yes	100	120
S2 Co	yes	10	(20)
S3 Co	yes	50	50
S4 Co	yes	90	100
Total		250	250

- BEFIT Tax Base:  $120 - 20 + 50 + 100 = 250$ ;
- Total average taxable result of the BEFIT group:  $100 + 10 + 50 + 90 = 250$ ;
- Allocable share:
  - S1 Co:  $100/250 \times 100 = 40\%$ ;
  - S2 Co:  $10/250 \times 100 = 4\%$ ;
  - S3 Co:  $50/250 \times 100 = 20\%$ ;
  - S4 Co:  $90/250 \times 100 = 36\%$
- Allocation of BEFIT tax base:
  - State S1:  $250 \times 40 = 110$ ;
  - State S2:  $250 \times 4\% = 10$ ;
  - State S3:  $250 \times 20\% = 50$ ;
  - State S4:  $250 \times 36\% = 90$

## Global Transfer Pricing Developments (9)

### BEFIT Directive (4) – Discussion Points

- International trend in recent years towards using international accounting standards (IFRS, US GAAP etc.) as tax base;
- Capabilities of tax professionals in international accounting standards;
- Next attempt after Common Corporate Tax Base (CCTB) and Common Consolidated Corporate Tax Base (CCCTB);
- EU proposes a formulary apportionment of profits, which the OECD rejects in the current TP Guidelines 2022 (§ 1.16: “a non-arm’s length approach: global formulary apportionment”);
- Impact on Switzerland: use of international accounting standards for Swiss corporate income tax purposes, consolidated taxation

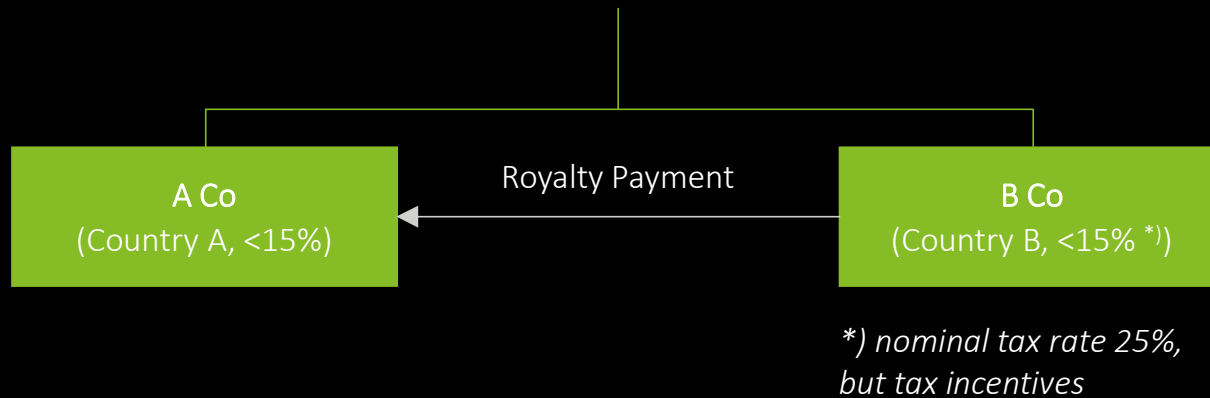
# Importance of Obtaining Transfer Pricing Certainty in Light of the Pillar 2 Rules

Thomas Hug / Manuel Angehrn / Vikram Chand



## Illustrative Example 1 – Setting the Scene

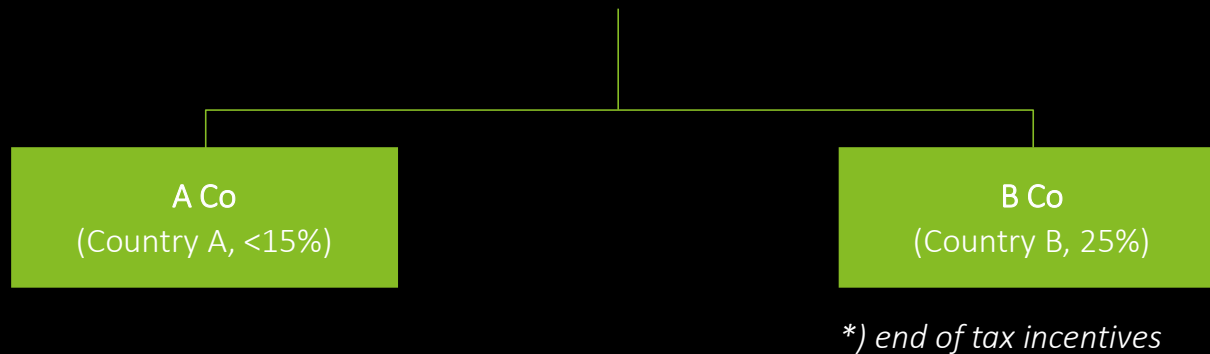
Year 1



- Benchmark study for royalty payment;
- QDMTT in Country A;
- QDMTT in Country B

*\*) nominal tax rate 25%,  
but tax incentives*

Year 4



- TP audit in country B with primary adjustment related to year 1 royalty payment → extra payment of tax;
- Corresponding adjustment related to year 1 royalty payment (MAP) → extra refund of tax

*\*) end of tax incentives*



## Applicable Pillar 2 Rules (1)

### Basic Principles OECD Model Rules

3.1.2. Financial Accounting Net Income or Loss is the net income or loss determined for a Constituent Entity (before any consolidation adjustments eliminating intra-group transactions) in preparing Consolidated Financial Statements of the Ultimate Parent Entity.

Starting point: Standalone constituent entity

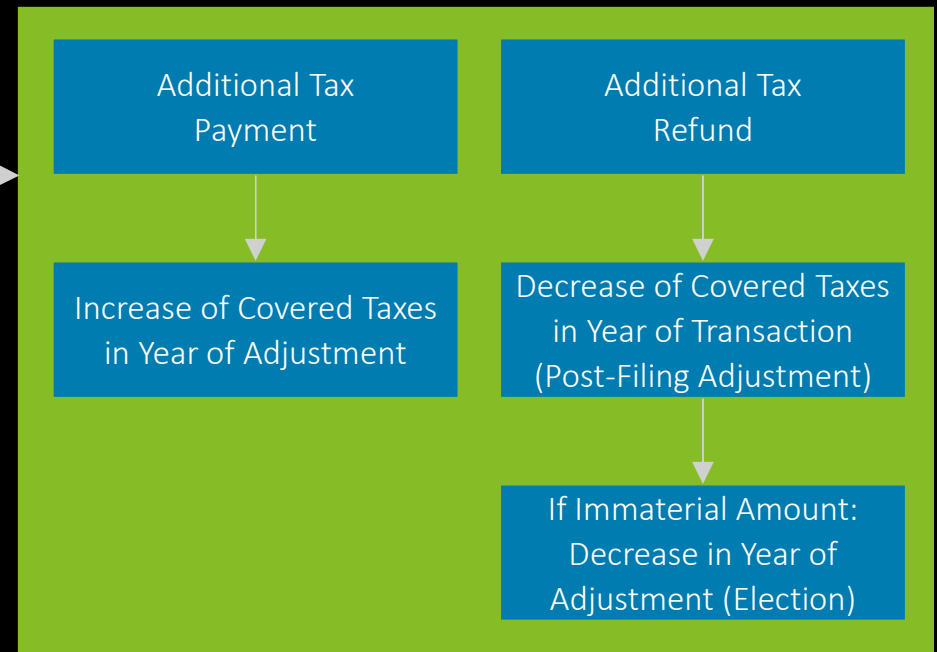
3.2.3. Any transaction between Constituent Entities located in different jurisdictions that is not recorded in the same amount in the financial accounts of both Constituent Entities or that is not consistent with the Arm's Length Principle must be adjusted so as to be in the same amount and consistent with the Arm's Length Principle. A loss from a sale or other transfer of an asset between two Constituent Entities located in the same jurisdiction that is not recorded consistent with the Arm's Length Principle shall be recomputed based on the Arm's Length Principle if that loss is included in the computation of GloBE Income or Loss. Rules for allocating income or loss between a Main Entity and its Permanent Establishments are found in Article 3.4.

Transactions between constituent entity: consistent with Arm's Length Principle (ALP)

## Applicable Pillar 2 Rules (2)

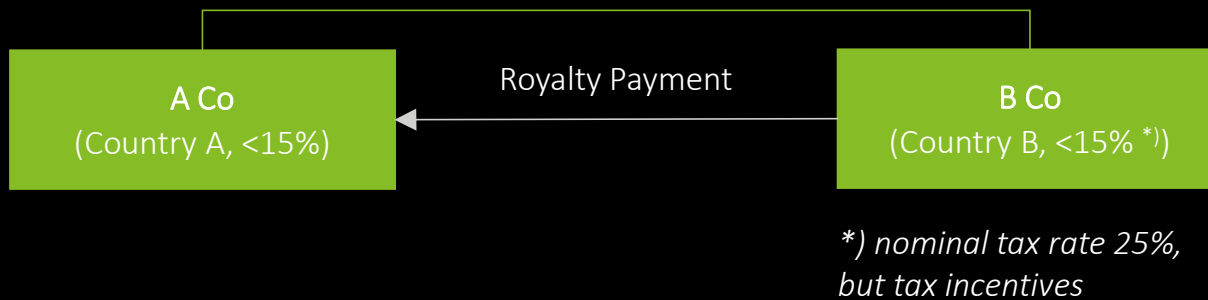
### Post-Transaction Transfer Pricing Adjustments OECD Model Rules

4.6.1. An adjustment to a Constituent Entity's liability for Covered Taxes for a previous Fiscal Year recorded in the financial accounts shall be treated as an adjustment to Covered Taxes in the Fiscal Year in which the adjustment is made, unless the adjustment relates to a Fiscal Year in which there is a decrease in Covered Taxes for the jurisdiction. In the case of a decrease in Covered Taxes included in the Constituent Entity's Adjusted Covered Taxes for a previous Fiscal Year, the Effective Tax Rate and Top-up Tax for such Fiscal Year must be recalculated under Article 5.4.1. In the Article 5.4.1 recalculations, the Adjusted Covered Taxes determined for the Fiscal Year shall be reduced by the amount of the decrease in Covered Taxes and GloBE Income determined for the Fiscal Year and any intervening Fiscal Years shall be adjusted as necessary and appropriate. A Filing Constituent Entity may make an Annual Election to treat an immaterial decrease in Covered Taxes as an adjustment to Covered Taxes in the Fiscal Year in which the adjustment is made. An immaterial decrease in Covered Taxes is an aggregate decrease of less than EUR 1 million in the Adjusted Covered Taxes determined for the jurisdiction for a Fiscal Year.

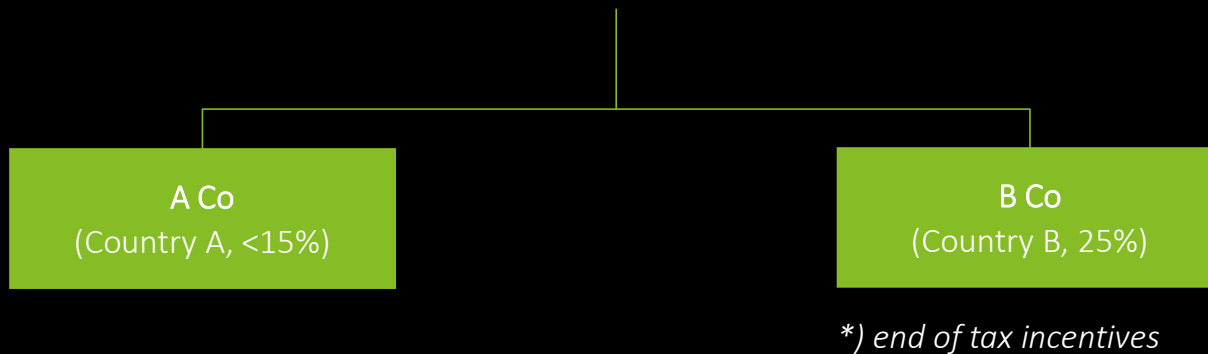


## Illustrative Example 1 – Continued

Year 1



Year 4



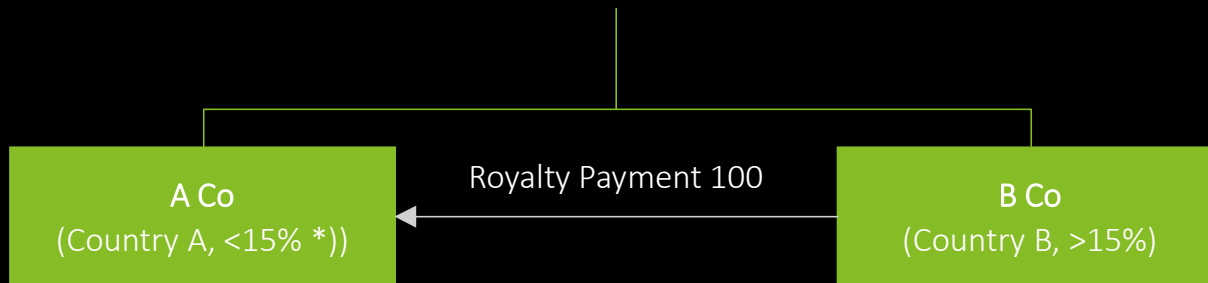
- Country A: Decrease of Covered Taxes in Year 1 (post-filing adjustment) → additional QDMTT in Year 1

Pillar 2 Over-Taxation /  
Double Taxation

- Country B: Increase of Covered Taxes in Year 4 → no impact on QDMTT

## Illustrative Example 2 – Setting the Scene

Year 1



*\*) Option 1: nominal tax rate 25%, but tax incentives  
Option 2: nominal tax rate <15%*

- Unilateral APA in Country B whereas only 80 are tax deductible for CIT purposes;
- No corresponding adjustment in Country A for CIT purposes;
- QDMTT in Country A

## Applicable Pillar 2 Rules

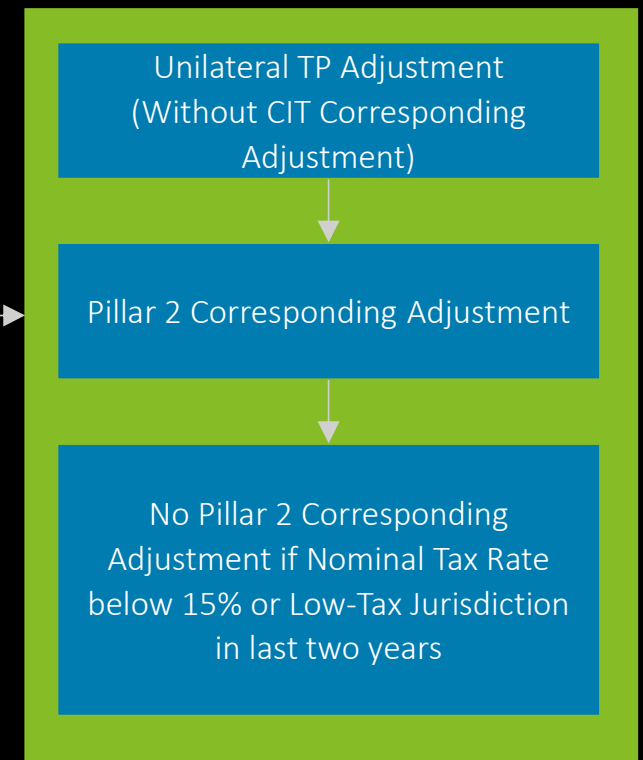
### Basic Principles OECD Model Rules & Commentary

100. In some cases, the transfer price used in the financial accounts of the counterparties may differ from the transfer price used to compute a counterparty's taxable income but not the transfer price used to compute another counterparty's taxable income in another jurisdiction. These differences may arise where:

- a. a unilateral APA has been agreed;
- b. a Constituent Entity files a tax return under a self-assessment system that includes book-to-tax adjustments, in order to comply with domestic transfer pricing rules; or
- c. a tax authority challenges and adjusts the transfer price used in the local tax return of one of the Constituent Entities.

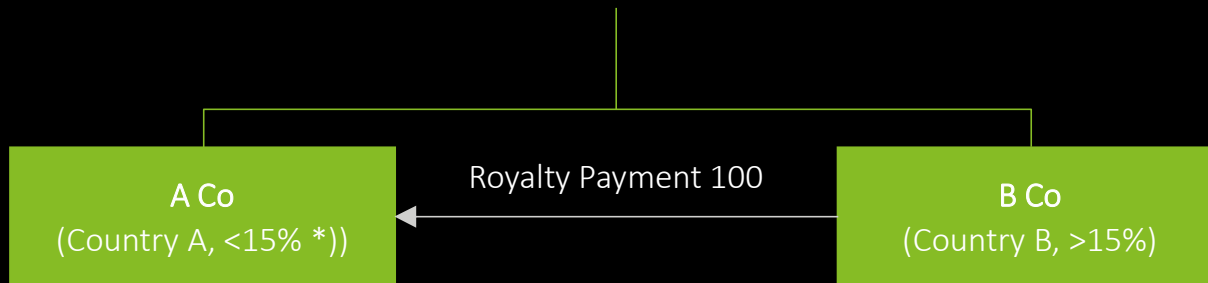
101. When these differences arise, the transfer price used for taxable income purposes is presumed to be consistent with the Arm's Length Principle. The GloBE Income or Loss should be adjusted accordingly under Article 3.2.3 where necessary to prevent double taxation or double non-taxation under the GloBE Rules. Specifically, a unilateral transfer pricing adjustment will result in a corresponding adjustment to the GloBE Income or Loss of all counterparties under Article 3.2.3, unless the transfer pricing adjustment increases or decreases the MNE Group's taxable income in a jurisdiction that has a nominal tax rate below the Minimum Rate or that was a Low-Tax Jurisdiction with respect to the MNE Group in each of the two Fiscal Years preceding the unilateral transfer pricing adjustment (an under-taxed jurisdiction).<sup>3</sup>

Commentary to art. 3.2.3. MR



## Illustrative Example 2 – Countinued

Year 1



\*) Option 1: nominal tax rate 25%, but tax incentives  
Option 2: nominal tax rate <15%

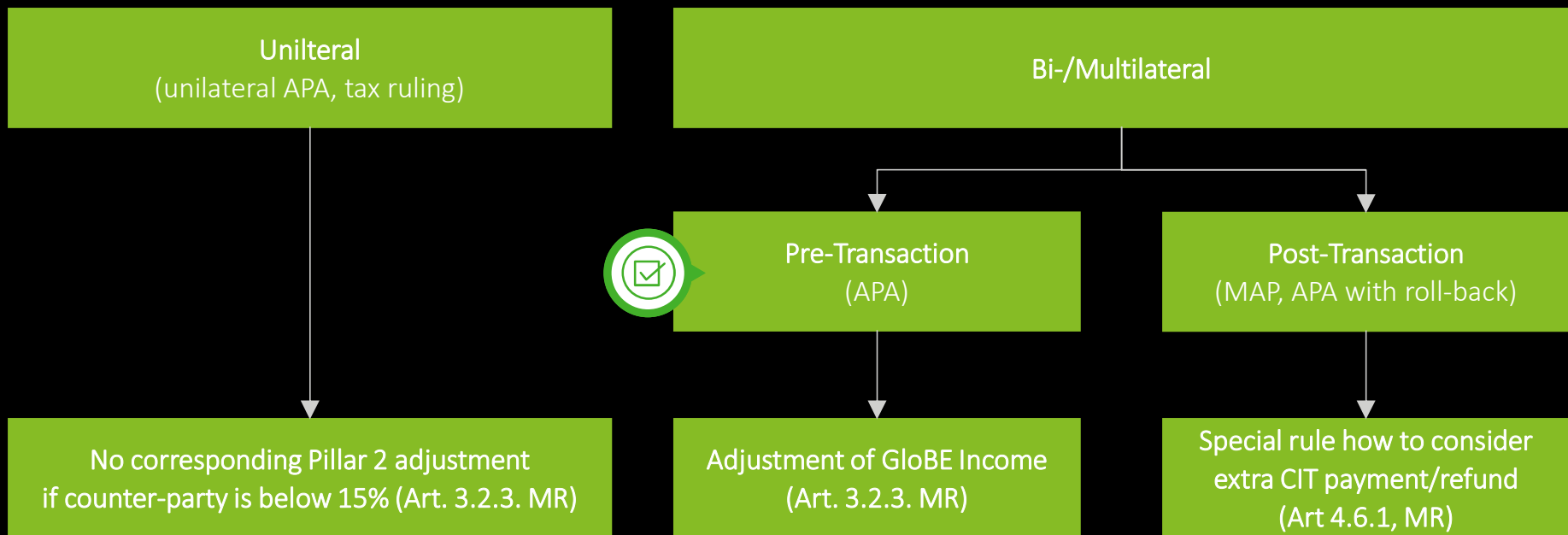
- Country A: No corresponding adjustment for Pillar 2 purposes, no (positive/negative) impact on QDMTT

Pillar 2 Over-Taxation /  
Double Taxation

- Country B: Corresponding adjustment for Pillar 2 purposes, but no impact since B Co is not subject to QDMTT due to tax rate above 15%

## Transfer Pricing Certainty as a Solution

But in which way..?



## Additional Aspects

### Areas of Misinterpretation, Contradicting Interaction, or Uncertainty

- “Arm’s Length Principle”: OECD Model Tax Convention vs. OECD Model Rules;

#### 1. Where

- a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State

and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions,

3.2.3. Any transaction between Constituent Entities located in different jurisdictions that is not recorded in the same amount in the financial accounts of both Constituent Entities or that is not consistent with the Arm’s Length Principle must be adjusted so as to be in the same amount and consistent with the Arm’s Length Principle. A loss from a sale or other transfer of an asset between two Constituent Entities located in the same jurisdiction that is not recorded consistent with the Arm’s Length Principle shall be recomputed based on the Arm’s Length Principle if that loss is included in the computation of GloBE Income or Loss. Rules for allocating income or loss between a Main Entity and its Permanent Establishments are found in Article 3.4.

- Different interpretation of art. 3.2.3 MR and Art. 4.6.1 MR by different tax administrations;
- Procedural aspects of post-filing adjustment (e.g., Switzerland: still possible after 10 years?)



## Cross-border Dispute Resolution Framework

### “Work in Progress”

- Dispute resolution framework for Pillar 2 not (yet) available;
- Art. 25(1) and 25(5) OECD Model Tax Convention not accessible for GloBE related disputes as these are not treaty disputes per se;
- Art. 25(3) OECD Model Tax Convention as back-up?

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

## Discussion (1)

- **What are currently the areas of greatest technical uncertainty for you when considering transfer pricing and the Pillar 2 rules?**
  - a) Understanding & interpretation of basic provisions in OECD Model Rules;
  - b) Pending further guidance by the OECD on specific topics under Pillar 2;
  - c) Country-specific deviation of the QDMTT model *vis-à-vis* the OECD Model Rules;
  - d) Country-specific timetable of “go-live” of the global minimum taxation;
  - e) Others

## Discussion (2)

- **Will you increase the number of (bilateral) APAs in your organisation in light of the Pillar 2 rules?**
  - a) Yes;
  - b) Maybe;
  - c) No;
  - d) Need to consider further

## Discussion (3)

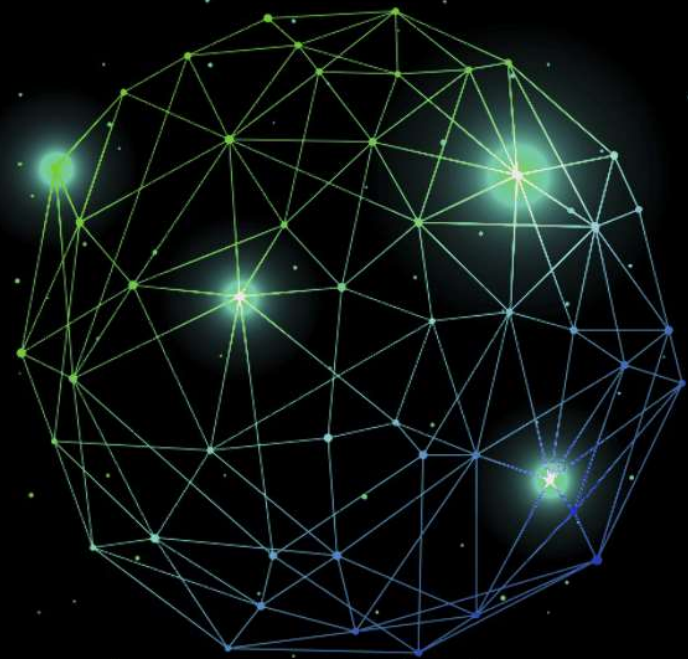
- **What changes from an operating model perspective are you planning to increase transfer pricing certainty in light of the Global Minimum Tax?**
  - a) Increase governance around transfer pricing processes;
  - b) Enhance technology to improve execution of transfer pricing policies;
  - c) Invest time to improve data quality to support transfer pricing processes;
  - d) Increase resources focused on executing transfer pricing policies;
  - e) Run additional training with finance / controlling team;
  - f) Other

## Discussion (4)

- **Are you planning to review your transfer pricing policies in light of the Global Minimum Taxation?**
  - a) Yes;
  - b) Maybe;
  - c) No;
  - d) Need to consider further

# Q&A & Wrap-up

Martin Krivinskas



## Three Take-aways

- No time to “digest” the OECD Model Rules – new tax and transfer pricing policies in the pipeline;
  - EU Public CbCR with interaction to “normal” CbCR and Qualified CbCR;
  - Transfer Pricing Directive;
  - BEFIT Directive
- “Imperfection is not perfection” – the procedural aspects of ALP-adjustments under Pillar 2 increase the risk of over-taxation / double-taxation;
- “Safety first” – obtaining certainty in transfer pricing becomes even more important
  - Pre- and not post-transaction;
  - Bi-/multinational and not unilateral



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